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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH BONILLA,

Defendant and Appellant.

B205363

(Los Angeles County
Super. Ct. No. BA320049)

APPEAL from a judgment of the Superior Court of Los Angeles County.

William R. Pounders, Judge. Affirmed with directions.

Derek Kowata, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jason C. Tran and Stephanie C. Brennan, Deputy Attorneys General, for Plaintiff and Respondent.

Joseph Bonilla (defendant) was convicted of the first degree murder of Alfredo Briano (Briano). (Pen. Code, § 187, subd. (a).)¹ The jury made findings of the discharge of a firearm proximately causing death (§ 12022.53, subds. (b), (c), (d) & (e)(1)) and of a gang enhancement (§ 186.22, subd. (b)(1)).

He appeals from the judgment and contends that: (1) the trial court abused its discretion when it admitted lay opinion testimony from a police officer concerning defendant's identity as the assailant as defendant appeared in a videosurveillance tape of the shooting; and (2) the abstract of judgment must be corrected as it failed to conform to the oral proceedings of judgment. We affirm the judgment and direct the correction of the abstract.

FACTS

On the evening of August 12, 2005, Erik Perez was driving a group of seven people (five males, including defendant and two females) around in his Lincoln Aviator sports utility vehicle. Some of the passengers were from three affiliated Antelope Valley gangs. While they were driving around they were engaged in nefarious activities, including knocking out the windows in a car that belonged to a rival Trece Kings gang member. Between 11:00 and 11:30 p.m., the group of eight entered a pool hall to use the restroom. On the way in, someone in the pool hall said, "[T]here was some bald fools in the pool hall." On the way out, the males in the Perez group precipitated a pool-hall-wide brawl by challenging R.A. for his gang affiliation and then punching and "jump[ing] on " him. R.A.'s two male and three female friends tried to pull them off R.A.

In the melee, defendant took out a handgun and fatally shot R.A.'s companion, Briano, in the chest with a .45-caliber hollow point bullet.

Perez's group fled the pool hall in the Aviator. Three of them were apprehended that night after a high-speed pursuit with the police. Six of them were eventually arrested.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

During the investigation L.N. directed law enforcement to an area where the Ruger pistol, later determined to be the murder weapon, was located. Investigators also found shoe prints matching defendant's shoes near the place where the handgun was recovered.

At trial, L.N., one of the females in the car, identified defendant as the person in the car with the gun who had been seated in the front passenger seat. K.W., one of R.A.'s friends, testified that she saw defendant during the melee when he hit her and then shot Briano. Twelve days after the shooting, K.W. identified defendant in a six-pack photographic display as the gunman. She was positive of her identification. She testified at trial that when she later saw defendant in court, she became more certain of her identification.

Defendant did not testify and offered no evidence.

DISCUSSION

I. The Detective's Lay Opinion Testimony

Defendant contends that the trial court erred by allowing Detective Joseph Martinez's narration of the 45-second videosurveillance tape where he identified defendant as the gunman. Defendant claims that the testimony amounted to lay opinion testimony that invaded the fact-finding province of the jury.

A. The Trial Court's Ruling

Following an Evidence Code section 402 hearing, Detective Martinez was permitted at trial to narrate during the showing of the pool hall's 45-second videosurveillance tape. To assist the jury in deciphering the videosurveillance tape, the detective tracked the various participants in the melee. In particular, he identified defendant on the videotape as the person who was going for his waistband in one photograph. In another photograph, the detective claimed that defendant was standing there with an extended arm, and in yet another, the detective indicated that there, defendant had "already fired the gun."

At the Evidence Code section 402 hearing on the admissibility of the detective's testimony concerning the identity of the person depicted on the videosurveillance tape, the detective acknowledged that prior to this case he did not know any of the people involved in

the melee. Thereafter, however, he had walked each of the six men originally charged in the case from the custody area to an interview room and had interviewed each person. Thus, he had had a chance to see them, how they walked, their mannerisms, and their actions. With some study of the videosurveillance tape, the detective was able to identify the individuals on the tape.

Defendant objected to the detective's narration as he lacked personal knowledge of the parties and their appearance prior to the shooting. Defendant also objected that the narration concerning the identity of those on the videotape usurped the function of the jury.

The prosecutor argued that the element of personal knowledge found in the case law was not an indispensable element for admissibility. He urged that it was very difficult to decipher what was going on in the photographs in the videosurveillance tape without the detective taking the jury through the still photographs on that tape and pointing out the various parties to the melee step by step, and the jury would have difficulty using the tape as evidence of identity and about how the shooting occurred without the assistance of the detective.

The trial court overruled defendant's objection and ruled that the detective's narration was necessary as an aid to understanding the videosurveillance photographs of the 45-second melee. It would permit the detective to identify the six participants from Perez's group and track them throughout the still photographs that comprised the videosurveillance tape. The trial court observed that otherwise, the tape is confusing—"it's like looking at a plate of spaghetti." So someone who had studied the tape would be of great assistance in helping the jury to interpret the tape. The trial court said that with a limiting instruction, it had no issue with the testimony.

The trial court elaborated that it would give the jury a limiting instruction instructing jurors not to consider the detective's opinion as to the identity of the people on the tape, except insofar as other witnesses had identified these persons as the perpetrators.

Defendant's trial counsel said that with such admonition, he would agree to the narration and that his objection was that the detective should not be able to testify that "this

is [defendant] who is doing the shooting,” as such testimony would invade the province of the jury.

Prior to the detective testifying before the jury, both L.N. and K.W. had testified. L.N. explained that during her interview with Detective Martinez, he had shown her nine still photographs taken from the videosurveillance tape. In these photographs, L.N. identified defendant and the others from the Aviator who had participated in the fight.

K.W. testified that she saw defendant shoot Briano. Before trial, K.W. selected defendant’s photograph from a six-pack photographic display. She also identified him in court as the gunman.

The trial court gave the jury the following limiting instruction: “I do want to emphasize that what you’ve heard is Detective Martinez’s opinion tracking the individuals identified by [L.N.] as coming with her to the pool hall throughout the video that you see . . . [T]he reason I’ve allowed that it is very difficult, I think, to understand that video unless you have some kind of assistance, but it’s an opinion. You’re free to accept it or reject it, because you are the trier of fact, and also . . . Detective Martinez did not render an opinion as to who did the shooting. This is only tracking the individuals identified by [L.N.], and that’s shown in exhibits 12 and 13 where she marked the video pictures with the names of the people that she came with to the pool hall.”

The trial court said that it would not allow the testimony to prove the fact. The narration was admissible only to show the events as they occurred.

B. The Analysis

Detective Martinez’s testimony was at most his opinion of the tracking of the various individuals depicted in the 45-second videosurveillance tape. At no time did the detective personally identify defendant as the shooter and therefore did not usurp the jury’s fact-finding role as to the identity of the gunman. In addition, the trial court gave a specific limiting instruction that the jury was not to consider the detective’s lay opinion testimony as to the identity of the shooter.

Evidence Code section 800 authorizes a lay witness to offer an opinion when it is “(a) [r]ationally based on the perception of the witness; and (b) [h]elpful to a clear understanding of his testimony.” Here the detective’s testimony was his explanation of the events as they unfolded on the videotape which he accomplished by tracking the individuals (previously identified by a percipient witness) through the course of their actions. This task was (1) based on the detective’s personal knowledge of the videotape (which he studied multiple times), the identifications made by L.N. and his personal pretrial interaction with the defendant and the other arrestees; and (2) was helpful to the jury in that it untangled confusing action depicted in the tape.

We review a trial court’s admission of lay opinion testimony for an abuse of discretion. (*People v. Farnam* (2002) 28 Cal.4th 107, 153-154; *People v. Medina* (1990) 51 Cal.3d 870, 887.) Here, the trial court reasonably exercised that discretion in finding the detective’s testimony accompanying the videotape was based on his own perception and was helpful to understanding the content of the videosurveillance tape. We find no error.

However, even if there was error, it would not result in a reversal. One of defendant’s companions in the Aviator, L.N., identified defendant in the photographic stills that were taken from the videosurveillance tape soon after his arrest. L.N. testified that defendant was present in the pool hall with the others when the shooting occurred. Also, K.W. identified defendant as Briano’s shooter in both a photographic array and in court.

In addition to identification evidence, defendant was linked to the crime by L.N. who testified that defendant was the one who was in possession of the handgun that night and who had been sitting in the right front passenger seat in the Aviator where the .45-caliber ammunition was later found. It was L.N. too who led officers to the handgun which had discharged the fatal bullet, as well as the nearby muddy footprint that matched the K-Swiss athletic shoes worn by defendant two days later when he was arrested.

With such persuasive direct and circumstantial evidence, it is not reasonably likely that any error in admitting the detective’s testimony affected the verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Also, the erroneous use of the testimony would not have denied

defendant a fundamentally fair trial. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611 [the mere erroneous exercise of discretion under the “normal” rules of evidence does not implicate the federal Constitution]; see *People v. Albarran* (2007) 149 Cal.App.4th 214, 229-230 [the error must render the trial arbitrary and fundamentally unfair].)

II. The Abstract of Judgment

Defendant contends that the abstract of judgment and the minute order contain entries that fail to conform to the oral proceedings of judgment.

The People agree that the contention has merit.

At sentencing, the trial court sentenced defendant to an aggregate term of 50 years to life consisting of a term of 25 years to life for the murder, plus an additional term of 25 years to life for the discharge of a firearm proximately causing death. For the gang enhancement, the trial court imposed a 15-year minimum term of parole eligibility.

The January 14, 2008, minute order indicates that count 1 was enhanced by a term of “life pursuant to Penal Code section 186.22, [subdivision] (b)(1),” and that defendant’s aggregate term of punishment was “50 years to life plus life.”

The abstract of judgment provides that in addition to the aggregate term of 50 years to life for count 1, that count was “further enhanced for a sentence of life pursuant to Penal Code section 186.22(b)(1). Sentence in count 1 is 50 years to life plus life.”

These entries do not conform to the oral proceedings of judgment and must be corrected. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

DISPOSITION

The judgment is affirmed.

The superior court shall cause its clerk to correct the January 14, 2008, minute order, as well as the abstract of judgment, to strike any references to the imposition of a life term for the gang enhancement (§ 186.22, subd. (b)(1)), and to an aggregate term of “50 years to life plus life.” In lieu thereof, the minute order and abstract of judgment should indicate that the trial court imposed a 15-year minimum term of parole eligibility pursuant to section 186.22, subdivision (b)(5), on the 25-year-to-life term imposed for the murder, which was

enhanced by a term of 25 years to life for the discharge of the firearm proximately causing death.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST